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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RICHARD DANIEL COX, Defendant and Appellant.	E077026 (Super.Ct.No. RIF125661) OPINION

APPEAL from the Superior Court of Riverside County. John D. Molloy, Judge. Reversed and remanded with directions.

Benjamin Kington, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Steve Oetting, Assistant Attorney General, A. Natasha Cortina and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Richard Daniel Cox, filed a petition for resentencing pursuant to Penal Code former section 1170.95,[1] which the court dismissed. Defendant contends the court erred in dismissing his petition. We reverse and remand the matter for reconsideration.

I. FACTUAL AND PROCEDURAL BACKGROUND[2]

The victim, a three-year-old whose mother left him with her boyfriend and defendant while she worked on the night of August 27, 2005, died after being punched; kicked; sodomized; dropped; having his anus, penis, and foot burned; and being forced to eat his own feces. (*Cox*, *supra*, E043487.) The cause of the victim's death was multiple blunt force injuries to his abdomen causing injuries to the liver, kidneys, and diaphragm. (*Ibid*.)

Defendant told the mother's coworker that "both" he and the boyfriend had used the victim like a "guinea pig" and given him dog food and beer. (*Cox*, *supra*, E043487.) Defendant told police that the boyfriend had beaten the victim that night. (*Ibid*.) He said the boyfriend had used a lighter to burn the victim's anus, penis, and foot. The boyfriend

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Effective June 30, 2022, Assembly Bill No. 200 (2021-2022 Reg. Sess.) amended and renumbered section 1170.95 as section 1172.6. (Stats. 2022, ch. 58, § 10.)

[2] We take judicial notice of this court's record, including the nonpublished opinion, in *People v. Cox* (E043487, Feb 17, 2009) [nonpub. opn.] (*Cox*), which defendant attached to his petition for resentencing. (Evid. Code, §§ 452, 459; Cal. Rules of Court, rule 8.1115(b).)

had stood upon the victim's chest with all his weight. The boyfriend picked up the victim by the feet and dropped him on his head. (*Ibid*.)

The boyfriend had previously babysat the victim approximately six times during which defendant was also present. (*Cox, supra,* E043487.) Defendant said that whenever the mother left the house, the boyfriend turned into a "monster"; the boyfriend would kick, stomp on, punch, and drop the victim; the boyfriend would burn the victim's foot and penis, and make him eat feces out of his diaper. (*Ibid*.)

Defendant admitted to police that the boyfriend had hit the victim "lots of times." Defendant said the minute the mother left for work he knew it was "hell week" for the victim. The boyfriend would immediately start kicking the victim in the stomach, ribs, and legs. The victim would scream to the boyfriend that he loved him to try to get the boyfriend to stop. The beatings would last the entire time the mother was working. The boyfriend would hit the victim with the force he would use on an adult. During one beating, the victim defecated in his diaper; the boyfriend made him eat it. (*Cox, supra,* E043487.) Defendant told police the boyfriend had committed other abuse such as pressing his thumb into the victim's ear until it bled, tripping the victim while he ran down the hall, forcing him to drink urine, and forcing him to drink alcohol. (*Ibid.*)

Defendant also admitted that he had spanked the victim on the hand and bottom six or seven times to discipline him. (*Cox, supra,* E043487.) Defendant said one time he had kicked the victim's leg out from under him causing him to fall to the ground. Defendant said on that occasion, the boyfriend held the victim while defendant would discipline him. Defendant said he may have hit the victim in the back of the head. (*Ibid*.)

On August 31, 2006, the People charged defendant by amended information with murder (§ 187, subd. (a), count 1) and assault on a child likely to cause great bodily injury (§ 273ab, count 2). The People additionally alleged the murder was intentional and involved the infliction of torture. (§ 190.2, subd. (a)(18).)

A jury found defendant guilty of the first degree torture-murder of the victim (§ 187, subd. (a), count 1) and assault on a child under the age of eight causing death (§ 273ab, count 2).[3] The trial court sentenced defendant to state prison for an indeterminate term of 25 years to life. (*Cox*, *supra*, E043487.)

Defendant appealed, challenging, in pertinent part, the sufficiency of the evidence to support his torture-murder and fatal child abuse convictions. (*Cox*, *supra*, E043487.) This court affirmed the judgment noting, in pertinent part, "The jury was instructed that they could find defendant guilty of the fatal assault either as a direct perpetrator or as an aider and abettor. Since the jury found defendant guilty of aiding and abetting [the boyfriend] on the first degree torture-murder, it is probable they convicted defendant of the fatal assault as an aider and abettor, since the same evidence supported both counts. However, . . . it is possible they found defendant was a direct perpetrator . . . ." (*Cox*,

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[3] The mother pled guilty to child endangerment in connection with the victim's death. (See *People v. Sieber* (Oct. 18, 2007, E041304) [nonpub. opn.].) She was in state prison when she testified at defendant's trial, for which the People granted her immunity. Defendant and the boyfriend were charged together; however, the trial court severed their trials. (*Cox*, *supra*, E043487.) A jury also convicted the boyfriend of first degree torture-murder and assault on a child under the age of eight causing death. (*People v. Mendoza* (Nov. 4, 2010, E048408) [nonpub. opn.].) This court affirmed the mother's and the boyfriend's judgments on appeal. (*Ibid*.)

supra, E043487.) "We note that defendant does not contest that, as a direct perpetrator, he did not commit abuse that caused [the victim's] death. We believe the jury could have disbelieved defendant's pretrial statements and found he inflicted the fatal injuries along with [the boyfriend]." (*Ibid.*) "Although [defendant] had no legal duty to report [the boyfriend], his failure to protect [the victim] from such harm showed his willingness to assist [the boyfriend] in the perpetration of such torturous acts upon [the victim]." (*Ibid.*) "We conclude that the evidence overwhelmingly supports that defendant aided and abetted [the boyfriend] in the first degree torture-murder and fatal assault on [the victim], despite defendant's attempts to minimize his involvement." (*Ibid.*)

Defendant also challenged the court's failure to instruct on lesser included offenses of involuntary manslaughter for first degree murder. (*Cox, supra,* E043487.) Defendant complained that the second degree murder instruction on the theory that defendant aided and abetted the target offense of child abuse homicide and child abuse likely to produce great bodily harm for the murder count was erroneous because the target offense was a greater offense (because the sentence for the conviction was 25 years to life) than the natural and probable consequences offense, i.e., second degree murder (which requires a 15-year-to-life sentence). (*Ibid.*) This court noted that since the jury rejected a second degree murder conviction in count 1, it had "necessarily concluded that defendant aided and abetted the first degree torture-murder . . . ." (*Ibid.*)

Defendant contended the evidence was insufficient to show that either he or the boyfriend intended to kill the victim. (*Cox, supra,* E043487.) This court noted that "the People proceeded on the theory that defendant aided and abetted [the boyfriend] in

torture-murder, which required a finding that [the boyfriend] willfully, deliberately, and with premeditation inflicted extreme and prolonged pain on [the victim]. [Citation.] The jury was not required to find that either defendant or [the boyfriend] intended to kill [the victim]." (*Ibid*.) The jury "obviously concluded that defendant aided in the injuries that resulted in [the victim's] death." (*Ibid*.)

On April 4, 2019, defendant filed a petition for resentencing pursuant to former section 1170.95, alleging he was not the actual killer, did not aid and abet the actual killer with the intent to kill, and was not a major participant acting with reckless indifference to human life. On April 26, 2019, the People filed a response to defendant's petition in which they argued, in pertinent part, that based on the facts recited in this court's opinion in *Cox*, *supra*, E043487, the petition should be denied because defendant "was convicted of aiding and abetting the first degree torture-murder and assault on a 3-year old child . . . ." On June 4, 2019, defense counsel filed a reply in support of the petition contending that defendant had been convicted as an aider and abettor to the murder without the intent to kill under the natural and probable consequences doctrine.

At a hearing on April 23, 2021, the People noted, "I've actually shared some facts from the appellate opinion that suggests to me strongly that [defendant] is not entitled to any relief. I don't know if [defense counsel] has had a chance to take a look at that." Defense counsel responded, "I completely agree with [the People]. I looked at the facts he is talking about. I see no reason or need to waste the Court's time and brief this when he really is dead on the money."

The court asked the People to recite the facts. The People noted that "defendant was convicted of first degree torture-murder and assault on a child under the age of eight causing death." "He aided in the torture beating death of a three-year-old boy." The People observed that this court had found that ample evidence supported the jury's conclusion that defendant aided and abetted his codefendant.

The court asked if the trial court gave felony murder instructions. Defense counsel responded that he did not know. The People responded, "I don't think so." The court said, "It doesn't sound like a case in which there should have been." Defense counsel stated, "It sounds like a direct aiding and abetting case." The court responded, "If it was a direct aiding and abetting case, aider and abettor law requires a specific intent to aid the target offense, unless there [were] natural and probable consequences instructions given. That would be the only spoiler here."

The court asked if the People knew "whether natural and probable consequences instructions were given." The People responded they did not, but could find out. The court replied: "So, ultimately, it sounds like this goes nowhere. It may make it past the prima facie case if, for example, natural and probable consequences instructions were indeed given." The court looked up the case but could not find any jury instructions.

On the parties' stipulation, the court issued an order to show cause. The court observed: "If you all submit on the Court of Appeals opinion, I'm going to find as a matter of law because it's already been determined that the defendant is indeed guilty under the aider and abettor theory, which requires a specific intent to commit the target offense." Both parties submitted.

The court ruled, "the factual analysis of guilty has already been made by the Court of Appeals. To the extent they find overwhelming evidence of guilt under aider and abettor theories, I think it's over, and there seems to be extraordinary support for actual slayer liability as well given that there's ample evidence he participated in the events." The court dismissed the petition.[4]

II. DISCUSSION

Defendant contends the court erred in dismissing the petition. He maintains there is no evidence, on this record, that the jury convicted him as either the actual killer or as a direct aider and abettor. The People respond that defendant's conviction for torture-murder bars him from former section 1170.95 relief as a matter of law. We hold that the court erred in applying the wrong legal standard in dismissing the petition.

"Effective January 1, 2019, the Legislature passed Senate Bill 1437 [(2017-2018 Reg. Sess.)] 'to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.' (Stats 2018, ch. 1015, § 1, subd. (f).) In addition to substantively amending sections 188

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[4] The reporter's transcript reflects that the superior court dismissed the petition. The minute order indicates the court denied the petition. We shall direct the court to correct the minute order. (See *People v. Jones* (2012) 54 Cal.4th 1, 89 [The minute order "'does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize.'"].) The reviewing court has the authority to correct clerical errors in the minute order. (*People v. Contreras* (2009) 177 Cal.App.4th 1296, 1300, fn. 3.)

and 189 of the Penal Code, Senate Bill 1437 added section 1170.95, which provides a procedure for convicted murderers who could not be convicted under the law as amended to retroactively seek relief." (*People v. Lewis* (2021) 11 Cal.5th 952, 959 (*Lewis*).)[5]

"Pursuant to section 1170.95, an offender must file a petition in the sentencing court averring that: '(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine[;] [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder[;] [¶] [and] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019.' [Citations.] Additionally, the petition shall state '[w]hether the petitioner requests the appointment of counsel.' (§ 1170.95, subd. (b)(1)(C).) If a petition fails to comply with subdivision (b)(1), 'the court may deny the petition without prejudice to the filing of another petition.'" (*Lewis, supra,* 11 Cal.5th at pp. 959-960.)

If a defendant makes a prima facie showing of entitlement to relief, "'the court shall issue an order to show cause.'" (*People v. Strong* (2022) 13 Cal.5th 698, 708 (*Strong*). "[T]he court must [then] hold an evidentiary hearing at which the prosecution bears the burden of proving, 'beyond a reasonable doubt, that the petitioner is guilty of

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[5] The Legislature amended section 1170.95 effective January 1, 2022. (Stats. 2021, ch. 551, § 2.) "The amendment . . . codifies certain holdings in *Lewis* . . . ." (*People v. Mejorado* (2022) 73 Cal.App.5th 562, 568, fn. 2.)

murder or attempted murder' under state law as amended by Senate Bill 1437. [Citation.] 'A finding that there is substantial evidence to support a conviction for murder, attempted murder, or manslaughter is insufficient to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing.' [Citation.] 'If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges.'" (*Id.* at p. 709.) "Senate Bill 1437 relief is unavailable if the defendant was either the actual killer, acted with the intent to kill, or 'was a major participant in the underlying felony and acted with reckless indifference to human life . . . .'" (*Id.* at p. 710.)

Senate Bill No. 775 (2021-2022 Reg. Sess.) amended former section 1170.95 to extend relief to persons "convicted of felony murder or murder under the natural and probable consequences doctrine *or other theory under which malice is imputed to a person based solely on that person's participation in a crime*." (Former § 1170.95, subd. (a), Italics added.) In addition, the Legislature "limited [the] use of prior appellate opinions, allowing trial judges to 'consider [only] the procedural history of the case recited.'" (*People v. Clements* (2022) 75 Cal.App.5th 276, 292; accord *People v. Flores* (2022) 76 Cal.App.5th 974, 988 ["[T]he factual summary in an appellate opinion is not evidence that may be considered at an evidentiary hearing to determine a petitioner's eligibility for resentencing."]; but see § 1172.6, subd. (d)(3) ["[T]he court may consider evidence previously admitted at any prior hearing or trial that is admissible under current law, including witness testimony, *stipulated evidence*, and matters judicially noticed.],

italics added.) Finally, as noted *ante*, "[t]he amended provision now specifies that '[a] finding that there is substantial evidence to support a conviction for murder . . . is insufficient to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing.'" (*Clements*, at p. 297.) Since the court's order dismissing the petition is not yet final, and Senate Bill No. 775 has already taken effect, "the revisions set forth in Senate Bill No. 775 apply to the instant petition." (*People v. Porter* (2022) 73 Cal.App.5th 644, 674.)

Here, the court erred in determining defendant was ineligible for relief by applying the wrong standard of law at the evidentiary hearing. The court found defendant ineligible for relief "as a matter of law *because it's already been determined* that the defendant is indeed guilty under aider and abettor theory . . . ." The court further noted: "Then the factual analysis of guilt has already been made by Court of Appeals. To the extent they find overwhelming evidence of guilt under aider and abettor theories, I think it's over . . . ." Thus, the court never actually made its own determination of the evidence but relied on this court's previous determination that substantial evidence supported defendant's conviction.

However, "'[a] finding that there is substantial evidence to support a conviction for murder . . . is insufficient to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing.'" (*Clements, supra*, 75 Cal.App.5th at p. 297.) Thus, the court erred in not holding that the People to their burden of proving defendant's ineligibility beyond a reasonable doubt. Therefore, the court's order dismissing the petition must be reversed, and the matter must be remanded to the trial court for an

evidentiary hearing at which the court may only deny the petition if the People prove defendant's ineligibility beyond a reasonable doubt.

III. DISPOSITION

The order dismissing defendant's petition is reversed. The matter is remanded with directions to hold an evidentiary hearing under section 1172.6, subdivision (d). We express no opinion on whether defendant is entitled to relief following the hearing. The superior court is directed to modify its April 23, 2021, minute order to reflect that it dismissed, rather than denied, defendant's petition for resentencing.

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McKINSTER
J.

We concur:

RAMIREZ
P. J.

SLOUGH
J.